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No. 84-1099

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHWEST SECURITY EQUIPMENT CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, REINFORCING AND ORNAMENTAL IRON WORKERS, LOCAL UNION NO. 75, AFL-CIO,
Intervenor.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI and BRIEF AMICUS CURIAE

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February 6, 1985

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Right to Work Legal Defense Foundation respectfully moves for leave to file the annexed brief as amicus curiae in support of the petitioner.

INTEREST OF AMICUS CURIAE

The National Right to Work Legal Defense Foundation is a non-profit charitable organization that exists to provide free legal assistance to individual employees

whose rights are being denied or who are suffering discrimination in employment as a result of compulsory unionism arrangements. It is the purpose of the Foundation to aid such individuals in protecting the rights guaranteed to them under federal and state law, inasmuch as they seldom are able, without assistance, to defend their rights against labor organizations which have abundant legal talent and resources at their disposal.

The National Right to Work Legal Defense Foundation has a vital interest in the present case, which addresses the unsettled question of whether an exclusive hiring hall arrangement, a device frequently used by labor organizations to impose compulsory unionism. survives the expiration of the collective bargaining agreement in which it is contained.

For the foregoing reasons, the National Right to Work Legal Defense Foundation requests that this Motion be granted and that the annexed brief be accepted for filing.

Respectfully submitted,

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BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The interest of the amicus curiae is contained in the Motion for leave to file this brief and is adopted here.

ISSUE PRESENTED

The sole issue presented in this brief is whether an exclusive hiring hall provision in a collective bargaining agreement survives the expiration of that agreement.

ARGUMENT

It is well established that "union security" devices do not survive a collective bargaining agreement. The exclusive hiring hall is a "union security" device, and consequently does not survive.

It is a well-settled principle that "union security" devices do not survive the expiration of the collective bargaining agreement in which they are contained. *NLRB v. Haberman Construction Co.*, 618 F.2d 288, 302 (5th Cir. 1980); *Sun Oil Co. v. NLRB*, 576 F.2d 553, 558 (3d Cir. 1978); *NLRB v. Cone Mills Corp.*, 373 F.2d 595, 598 (4th Cir. 1967); *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 619-20 (3d Cir. 1963); *S. Freedman Electric, Inc.*, 256 N.L.R.B. 432, 443 (1981). *Haberman*, supra, deals with the point succinctly:

> Contractual terms which are solely a product of the contract itself form an exception to the general rule that, at contract expiration, an employer is not free to deviate from contractual terms which are mandatory subjects of bargaining unless he has first bargained to impasse. Since the existence of these terms presupposes the existence of a contract, once that agreement has expired, an employer may alter these conditions without bargaining with the union . . . . Illustrations of terms of this type include . . . union security provisions . . . .
>
> 618 F.2d at 302 n. 16.

If, as demonstrated above, a "union security" device does not survive its collective bargaining agreement, it

would follow that an exclusive hiring hall provision would likewise expire with its contract if the exclusive hiring hall is a "union security" device. We contend that it clearly is. In *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667 (1961), this Court observed:

> It may be that the very existence of the hiring hall encourages union membership. We may assume that it does.
>
> 365 U.S. at 675.

The point the Court was making was not that all hiring halls are operated in a discriminatory manner to the detriment of the non-union worker, but that a hiring hall, by its "very existence", functions as a "union security" device. The fact that a job-seeker's only avenue to employment is by referral through an exclusive union hiring hall requires that he present himself, smiling and cooperative, to the union agent. It is to belabor the obvious to argue that an anxious applicant, in such a situation, will take every available step to make himself acceptable to the referring entity. Under such circumstances, the pressure to join the union is more than subtle. As Professor Thomas R. Haggard states in his treatise, *Compulsory Unionism, the NLRB, and the Courts* (1977) at 112:

> A primary concern of the law has been that hiring halls not become a cover for de facto closed shop or other forms of otherwise illegal union security arrangements.

It is interesting to note that Professor Haggard devotes an entire chapter of the just-cited work to the issue before us, titling it, "Union Hiring Halls as a Form of Compulsory Unionism", *id.* at 97-113.

That the exclusive hiring hall is accepted without question as a form of "union security" in the legal community, and particularly among specialists in labor law, is demonstrated by the fact that authors and editors of scholarly works routinely classify the exclusive hiring hall as a subdivision of "union security". 48 Am. Jur. 2d *Labor and Labor Relations* § 17 (1979); II *The Developing Labor Law* 1396-1406 (2d ed. 1983); R. Gorman, *Basic Text on Labor Law* 664-70 (1976); T. Haggard, *Compulsory Unionism, the NLRB, and the Courts*, supra; 8 T. Kheel, *Labor Law* §§ 40.04[4], 42.03[1] (1984).

Twenty-one states have enacted Right-to-Work laws for the purpose of prohibiting "union security" devices within their borders. During the developmental period of case law on the hiring hall issue, the highest courts of three of those states, Arkansas, South Carolina, and Nevada, held the exclusive hiring hall to be violative of their Right-to-Work laws. *Kaiser v. Price-Fewell, Inc.*, 235 Ark. 295, 359 S.W.2d 449 (1962), *cert. denied*, 371 U.S. 955 (1963); *Branham v. Miller Electric Co.*, 237 S.C. 540, 118 S.E.2d 167 (1961); *Building Trades Council of Reno v. Bonito*, 71 Nev. 84, 280 P.2d 295 (1955). The rationale underlying those decisions was that the exclusive hiring hall was clearly a variety of "union security" —a potent device for inducing support of the union, if not outright membership. The *Kaiser* court spoke as

follows:

> The arrangement here in question therefore appears to be nothing more than an intricate web set up whereby the union can control employment. This control would be exclusive except for the employer's privilege of rejection. The employer would be subjected to work stoppage based upon breach of contract if he should permanently hire his brother without first referring him through the union hiring hall. No longer could public or private employment agencies or, for that matter, competing unions refer persons directly to an employer for employment.
>
> 359 S.W.2d at 453.

Thus, when one considers the comments of this Court, hiring hall decisions from Right-to-Work states, the views of legal scholars, and, not least important, a common sense awareness of what an exclusive hiring hall is and how it operates in the real world, the conclusion is inescapable that the hiring hall is a potent form of "union security". That fact, coupled with the principle that "union security" provisions expire with the collective bargaining agreements containing them, makes it clear that an exclusive hiring hall arrangement does not survive.

CONCLUSION

Contrary to the holding of the Ninth Circuit panel below, an exclusive hiring hall arrangement is a "union security" device which expires together with the collective bargaining agreement containing it. Untold numbers of

working people stand to suffer employment discrimination if the decision below is allowed to stand. The issue in question is one of major significance in the field of labor law, and a definitive ruling by this Court is needed to settle the matter. The Petition for Certiorari should be granted.

Respectfully submitted,

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